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No. 82-5987

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

HERBERT LEE RICHARDSON,

Petitioner

v.

STATE OF ALABAMA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

# RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Should certiorari be granted to decide federal questions which were not addressed in the state appellate court decision below because of the limited nature of the state procedural remedy being sought?

2. Should certiorari be granted to review a federal question not presented by the facts?

3. Does Beck v. Alabama, 447 U.S. 625 (1980), as clarified by Hopper v. Evans, 102 S. Ct. 2054 (1982), require that every Alabama pre-Beck capital conviction and death sentence be set aside regardless of the circumstances?

## PARTIES

The caption contains the names of all the parties in the court below.

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## OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming the trial court's denial of the petition for a writ of error coram nobis is reported as Richardson v. State, 419 So. 2d 289 (Ala. Cr. App. 1982), and is attached to this brief as Appendix A.

2. No opinion was issued by the Alabama Supreme Court when on October 1, 1982, it denied the petition for a writ of certiorari to review the Court of Criminal Appeals' decision. A copy of the notification announcing the denial of certiorari is attached to this brief as Appendix B.

## JURISDICTION

The Alabama Supreme Court's order denying the petition for a writ of certiorari to review the Alabama Court of Criminal Appeals' decision was entered October 1, 1982. On November 24, 1982, Justice Powell signed an order extending petitioner's time for filing a petition for a writ of certiorari to and including December 30, 1982.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The petition discusses questions involving the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution.

## STATEMENT OF THE CASE

On August 16, 1977, a young black child named Rena Mae Collins was blown to bits by a bomb planted on her front porch in Dothan, Alabama. As a result, petitioner was convicted in Houston County Circuit Court on January 25, 1978, for the Code of Alabama 1975, §13-11-2(a)(9) capital offense of first degree murder involving the intentional killing of a person by means of an explosion near an inhabited dwelling house. On February 15, 1978, he was sentenced to death.

Petitioner's conviction and death sentence was affirmed on direct appeal in Richardson v. State, 376 So. 2d 205 (Ala. Cr. App. 1978), aff'd, 376 So. 2d 228 (Ala. 1979). No petition for certiorari was filed in this Court.

A 28 U.S.C. §2254 petition for a writ of habeas corpus petitioner had filed during the pendency of his direct appeal was dismissed by the United States District Court for the Middle District of Alabama on November 30, 1978, for failure to exhaust state remedies. Richardson v. Oliver, No. 78-89-S (M.D. Ala. unpublished order).

After his direct appeal was completed, petitioner filed another petition for a writ of habeas corpus and motion for a stay or execution in the United States District Court for the District of Alabama. On February 5, 1980, the court granted a stay of execution. On July 14, 1980, the court entered an order denying the petition for a writ of habeas corpus, and vacating the stay of execution. On September 9, 1980, the court denied petitioner's request for a certificate of probable cause. Richardson v. Oliver, No. 79-99-S (M.D. Ala. unpublished orders).[1]

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[1]While his second habeas petition (No. 79-99-S) was still pending, petitioner filed a complaint under 42 U.S.C. §1983 against a police officer who had been involved in a search and seizure leading to petitioner's conviction. That complaint was dismissed on July 10, 1980, and a request for a certificate of probable cause to appeal was denied on August 15, 1980. Richardson v. State, No. 80-0061-S (M.D. Ala. unpublished orders).

The proceeding that gave rise to the present certiorari petition began on April 10, 1981, when petitioner filed in the Circuit Court of Houston County, Alabama, a petition for a writ of error coram nobis. Thereafter, the court conducted an evidentiary hearing, and on September 18, 1981 entered an order denying the petition (R. 79). On June 29, 1982, that denial was affirmed by the Alabama Court of Criminal Appeals in an opinion published as Richardson v. State, 419 So. 2d 289 (Ala. Cr. App. 1982) (App. A). That court denied rehearing on July 27, 1982, and on October 1, 1982 the Alabama Supreme Court denied without opinion petitioner's petition for a writ of certiorari. Richardson v. State, No. 81-937 (Ala. Oct. 1, 1982) (unpublished order) (App. B). Petitioner then filed his certiorari petition in this Court.[2]

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[2]After it had affirmed his conviction and sentence on direct appeal, the Alabama Supreme Court set petitioner's execution for February 8, 1980. Ex parte Richardson, No. 78-183 (Ala. Nov. 13, 1979) (unpublished order). The United States District Court for the Middle District of Alabama entered a stay of execution on February 5, 1980, in order to consider petitioner's habeas petition, but vacated that stay when it denied the petition on July 14, 1980. Richardson v. Oliver, No. 79-99-S (M.D. Ala. unpublished orders).

No new date of execution has been set for petitioner, and no motion to have a new execution date set is pending.

## SUMMARY OF ARGUMENT

Four of the five federal questions discussed in the certiorari petition involve search and seizure issues which were not decided by the court below because of the limited scope of the state writ of error coram nobis remedy. As to those issues, state law is an independent and adequate basis for the state court judgment denying petitioner's collateral attack on his conviction and sentence.

The other federal question raised by the certiorari petition concerns Beck v. Alabama, 447 U.S. 625 (1980). The issue presented by the facts and decided below concerns whether Beck requires the reversal of every Alabama pre-Beck capital conviction and sentence regardless of the facts and circumstances. The Alabama Court of Criminal Appeals holding that Beck did not mandate reversal absent some showing of prejudice is consistent with Hopper v. Evans, 102 S. Ct. 2049 (1982).

The issue of whether Beck requires the reversal of a pre-Beck capital conviction or sentence if the existence of the preclusion clause affected the trial tactics or conduct of the defendant is not before this Court. The petition for a writ of error coram nobis filed in this case did not even allege any such effect; petitioner offered no evidence of any such effect in the state court evidentiary hearing; and the Alabama Court of Criminal Appeals did not decide the issue because it was not presented by the facts.

## ARGUMENT

### I. CERTIORARI SHOULD NOT BE GRANTED ON THE SEARCH AND SEIZURE FEDERAL QUESTIONS BECAUSE THEY WERE NOT DECIDED BELOW, AND THE STATE COURT JUDGMENT RESTS ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND

The first five of the six federal questions the petition discusses involve the validity of certain searches and seizures which resulted in evidence used against petitioner at trial. Petition at 2 - 3 and 5 - 9. The validity of those searches and seizures was addressed at trial and on direct appeal, Richardson v. State, 376 So. 2d 205, 208-216 (Ala. Cr. App. 1978), aff'd; 376 So. 2d 228 (Ala. 1979), but the state courts refused to address the merits of those issues again in this proceeding. In affirming the denial of coram nobis relief, the Alabama Court of Criminal Appeals held:

> The appellant's first contention in his brief is that he should be granted a new trial because: (1) The affidavits used to obtain the search warrant for his automobile; and (2) The affidavits used to obtain the search warrant for his home were false. This issue was fully submitted by the appellant to the trial court, and there adjudicated, and upon appeal to this Court from his conviction, was affirmed by this Court. See Richardson v. State, Ala.Cr.App., 376 So.2d 205, and again confirmed by the Supreme Court of Alabama. See Ex Parte Richardson, Ala., 376 So.2d 228. This Court will not adjudicate again the same issues that have already been adjudicated between the same parties, over and over again on an application for a writ of error coram nobis. Richardson v. State, supra; Ex Parte Richardson, supra; Summers v. State, Ala. Cr.App., 366 So.2d 336; Ex Parte Rudolph, 276 Ala. 392, 162 So.2d 486, cert. den., 377 U.S. 919, 84 S.Ct. 1185, 12 L.Ed.2d 88; Impson v. State, Ala.Cr.App., 339 So. 2d 1098. We hold that the matters of the validity of the search warrants have been fully adjudicated, and the appellant may not again adjudicate them by this petition for a writ of error coram nobis.

Richardson v. State, 419 So. 2d 289, 291 (Ala. Cr. App. 1982).

Certiorari should not be granted to review the decision of the Alabama Court of Criminal Appeals insofar as the searches and seizures are concerned, because that court did not decide in this proceeding any federal question involving the searches and seizures. Instead, it simply refused to re-decide the federal questions that had been addressed on direct appeal, and it did so because of the limited nature of the Alabama coram nobis remedy. See, e.g., Ex parte Rudolph, 276 Ala. at 393; Sumners v. State, 366 So. 2d at 340. Therefore, there is no federal question decision to review within the meaning of Supreme Court Rule 17.1(b) and (c).

This Court lacks jurisdiction to review aspects of a state court decision that do not address the merits of any federal question. E.g., Beck v. Washington, 369 U.S. 541, 553 (1962); Bolling v. Lersner, 91 U.S. 594 (1876). More specifically, this Court does not have jurisdiction to review denial of a federal constitutional claim in a state collateral proceeding when the basis of that denial is the limited scope of the state collateral remedy. Woods v. Nierstheimer, 328 U.S. 211 (1946); Adams v. Russell, 229 U.S. 353 (1913) (where state procedural law does not permit re-adjudication of federal question in second proceeding).

Stated somewhat differently, the holding below that matters decided on direct appeal cannot be re-litigated in an Alabama error coram nobis proceeding is a state law basis for the Alabama courts' refusal to grant petitioner relief in this proceeding. This Court has no jurisdiction to review a state court decision based on an independent and adequate state law ground. E.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977).

Therefore, this Court lacks jurisdiction to review the first five questions presented in the petition, the ones involving the searches and seizures.

## II. CERTIORARI SHOULD NOT BE GRANTED ON THE QUESTION INVOLVING BECK v. ALABAMA, 447 U.S. 625 (1980), BECAUSE THE ONLY SUCH QUESTION PRESENTED BY THE EVIDENCE AND DECIDED BELOW WAS CORRECTLY DECIDED

As his sixth question presented for review, the petitioner contends that he is entitled to have his death sentence set aside under Beck v. Alabama, 447 U.S. 625 (1980). Petition at 3 and 9 - 10. That broadly stated federal question is properly presented for review, because it was decided on the merits by the court below. Richardson v. State, 419 So. 2d 289, 292-293 (Ala. Cr. App. 1982). However, this Court should not grant certiorari to review the question because the lower court decided the matter correctly under this Court's precedents.

As Hopper v. Evans, 102 S. Ct. 2049 (1982), clarified and emphasized, this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980), was limited to a holding that a death sentence may not be carried out when the jury that convicted the defendant of the capital offense was not permitted to consider a lesser included non-capital offense verdict, "and when the evidence would have supported such a verdict." 447 U.S. at 627. This Court held in Hopper v. Evans, 102 S. Ct. 2049, 2052-2053 (1982), that the Constitution does not require, and may even prohibit, a lesser offense instruction when there is no evidentiary basis for it.

Under the facts of this case, there was no evidentiary basis for an lesser included non-capital offense verdict at petitioner's trial. As the Court of Criminal Appeals held in affirming the denial of coram nobis relief:

> The appellant's petition for a writ of error coram nobis in this case does not aver that the petitioner was entitled to an instruction of a lesser included offense. There is no evidence before this Court that the petitioner was entitled to

> have the jury instructed on a lesser included offense. There is no evidence before this Court that the evidence presented to the jury at the original trial of the petitioner would have supported a conviction of a lesser included offense. The evidence fully supports the jury verdict that the petitioner intended to kill the victim. We hold that the preclusion clause did not prejudice the petitioner in any way, and that the trial judge did not err when he denied petitioner's petition for a writ of error coram nobis. Hopper v. Evans, supra; Beck v. Alabama, supra; Richardson v. State, Ala.Cr.App. 376 So.2d 205; Ex Parte Richardson, Ala. 376 So.2d 228; Beck v. Alabama, 444 U.S. 897, 100 S.Ct. 204, 62 L.Ed.2d 132; Summers v. State, supra.

Richardson v. State, 419 So. 2d at 293. Those factfindings are entitled to great weight and are due to be accepted by this Court, absent exceptional circumstances not present here. E.g., California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 111-112 (1980); Whitney v. California, 274 U.S. 357, 367 (1927).

On p. 10 of his certiorari petition to this Court, petitioner belatedly contends that the very existence of the preclusion clause harmed him by affecting his trial strategy. That claim might be deserving of further attention if it had been properly presented and supported by evidence in the court below, see, Hopper v. Evans, 102 S. Ct. at 2054 n., but it was not. Petitioner's coram nobis petition did not even allege that his trial tactics or defense was influenced in any way by the existence of the preclusion clause, nor did petitioner or his trial attorney testify at the evidentiary hearing that the preclusion clause had had any effect. Therefore, the more narrow Beck v. Alabama question petitioner would have this Court review was not decided below nor is it presented by the

facts of this case. Richardson v. State, 419 So. 2d at 293 ("the preclusion clause did not prejudice petitioner in any way.").[3]

The only federal question properly presented and decided in the court below is whether Beck v. Alabama, 447 U.S. 625 (1980), mandates setting aside every pre-Beck capital conviction and death sentence regardless of circumstances. That is the Beck issue petitioner raised in his coram nobis petition, and the Court of Criminal Appeals properly answered it in the negative under Hopper v. Evans, 102 S. Ct. 2049 (1982). The other Beck issue petitioner would have this Court review — whether a pre-Beck capital defendant whose trial strategy was affected by the preclusion clause is entitled to have his conviction or sentence set aside — was not decided in the court below, nor is it presented by the facts of this case.

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[3]Contrary to the implication on p. 10 of the certiorari petition, the State of Alabama has not refused new trials to all pre-Beck capital defendants. Instead, the vast majority of pre-Beck capital convictions and death sentences have been set aside because the trial record or other evidence indicated that the preclusion clause prejudiced the defendants in those cases.

Petitioner's case is one of only twelve Alabama pre-Beck death sentence cases in which there was no evidence at trial and none offered since trial to indicate that the preclusion clause harmed the defendant in any way at all. The other eleven such cases are still pending at one level or another of the Alabama appellate process.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of this brief on petitioner, by placing a copy in the United States mail, postage prepaid, and properly addressed as follows:

Herbert Lee Richardson
P. O. Box 37
Holman Station, Alabama 36503

I further certify that I have served all parties required to be served.

Done this 4th day of February, 1983.

EDWARD E. CARNES
ASSISTANT ATTORNEY GENERAL

Cite as Ala.Cr.App., 419 So.2d 289

Herbert Lee RICHARDSON

v.

STATE.

4 Div. 956.

Court of Criminal Appeals of Alabama.

June 29, 1982.

Rehearing Denied July 27, 1982.

Certiorari Denied, Oct. 1, 1982
Alabama Supreme Court 81-837.

The Circuit Court, Houston County, Jerry M. White, J., denied petition for writ of error coram nobis seeking to set aside murder conviction and death sentence, and petitioner appealed. The Court of Criminal Appeals, Joseph J. Mullins, Retired Circuit Judge, held that: (1) matters of validity of search warrant, which had been fully adjudicated, could not be again adjudicated by petition for writ of error coram nobis; (2) trial court did not err to prejudice of petitioner when it did not grant a new trial on ground that he was denied counsel; and (3) where there was no evidence that petitioner was entitled to have jury instructed on lesser included offense, where evidence presented to jury at original trial would not have supported conviction of lesser included offense, and where evidence fully supported verdict that petitioner intended to kill victim, failure to permit jury to consider lesser included offense did not prejudice petitioner in any way.

Affirmed.

1. Criminal Law ⇐997.18

Court of Criminal Appeals will not adjudicate again same issues that have already been adjudicated between same parties over and over again on application for writ of error coram nobis, and thus petitioner was not entitled to have matters of validity of search warrants for his automobile and home, which had been fully adjudicated by trial court and on direct appeal, again adjudicated on petition for writ of error coram nobis.

2. Criminal Law ⇐997.16(7)

In absence of averment in petition for writ of error coram nobis that petitioner was denied assistance of attorney at his original trial, and in absence of any evidence showing denial of his right of counsel at his original trial, trial court did not err to prejudice of petitioner when it did not grant him new trial on ground that he was denied counsel.

3. Criminal Law ⇐997.11, 997.15(2)

Petitioner must aver facts, in petition for writ of error coram nobis, which if proven would entitle him to writ and at trial he must prove such facts.

4. Criminal Law ⇐997.18

Where petition for writ of error coram nobis did not aver that petitioner was entitled to instruction on lesser included offense, where there was no evidence that petitioner was entitled to have jury instructed on lesser included offense, where there was no evidence supporting conviction of lesser included offense, and where evidence fully supported jury verdict that petitioner intended to kill victim, preclusion clause did not prejudice petitioner, who was convicted under statute which provides for death or life imprisonment without parole for exploding dynamite when person is intentionally killed by explosion. Code 1975, §§ 13-2-60, 13-2-61, 13-11-1 to 13-11-9, 13-11-2(a)(9) (Repealed).

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Herbert Lee Richardson, pro se.

Charles A. Graddick, Atty. Gen., and Elizabeth Ann Evans, Asst. Atty. Gen., for appellee.

JOSEPH J. MULLINS, Retired Circuit Judge.

This appeal is from a denial of a petition for a writ of error coram nobis seeking to set aside appellant's 1978 conviction for murder and a sentence of death. His origi-

nal conviction was appealed from the Houston County Circuit Court to this Court, and on October 3, 1978 the case was remanded to the trial court with instructions. On November 21, 1978, following remand, it was affirmed by this Court, and on December 19, 1978 rehearing was denied. *Richardson v. State*, Ala.Cr.App. 376 So.2d 205. The Supreme Court of the State of Alabama granted certiorari to review appellant's conviction on the ground that it was a death case. Rule 39(c) ARAP, and on September 28, 1979 affirmed the judgment of the Court of Criminal Appeals. On November 6, 1979 petition for rehearing in the Supreme Court was denied. The Supreme Court in affirming the holding of the Court of Criminal Appeals stated that "petitioner's allegations of error: (1) That the initial warrantless search of petitioner's automobile was illegal; (2) That the search of appellant's home was conducted pursuant to an improperly issued search warrant. We find no merit in either contention made by the petitioner." The Supreme Court carefully reviewed the record and found that petitioner's conviction is adequately supported by the evidence. *Ex Parte Richardson v. State of Alabama*, Ala. 376 So.2d 228.

We shall not recite the facts of the crime in this record because they are fully set out in the opinion of this Court in the case of *Richardson v. State*, Ala.Cr.App. 376 So.2d 206.

On April 10, 1981 the petitioner, Herbert Lee Richardson, filed a petition for a writ of error coram nobis in the Circuit Court of Houston County, Alabama. On April 16, 1981 the district attorney of the 20th Judicial Circuit of Alabama filed a motion to dismiss the petition for writ of error coram nobis filed in this cause. On July 2, 1981 the petitioner filed a supplementary amendment to the petition for a writ of error coram nobis. On July 16, 1981 the trial court entered an order appointing a competent attorney to represent the petitioner, setting the time and place for a hearing on the petition, and the motion to dismiss the petition, and directing the Warden at Holman Prison to have the petitioner present so that he and his attorney may present such evidence as may be proper in said cause. On the 18th of September, 1981, with the petitioner, and his counsel, and the state, and its counsel, present in open court, a hearing on the petition was had.

Petitioner's evidence consisted of five witnesses and two exhibits. Petitioner's first witness, Thomas W. Sorrells, district attorney for the 20th Judicial Circuit, State of Alabama, testified, in substance, as follows: That he participated in the investigation that led to the arrest, trial, and conviction of the petitioner; that he accompanied the police to Abbeville to pick up the petitioner, who had been arrested, and to talk to petitioner's fellow employees, and to look around the site where the petitioner had been working; that he did participate in the obtaining of a search warrant for the petitioner's house in Hartford, Alabama; that he related the information given him by Sergeant Lock to Judge Block; that at that time the petitioner was in custody in Dothan; that he was present in the area, but did not participate in the actual search of petitioner's house; that he was not present when petitioner's vehicle was searched.

The petitioner testified, in substance, that the pipe on his job site was all two and a half inch pipe; that two and a half inch pipe would be the inside size of the pipe, and that three inches would be the outside diameter of the pipe; that all pipe at the job site was galvanized; that the only pipe he recalls being at his house was three-quarter inch pipe, and it was not galvanized. On cross-examination petitioner admitted that he was not present when the officer found pipe at his home, and that the pipe described by the police was approximately two inch pipe; that these facts about the size of the pipe came out at his trial.

Doris Weems, petitioner's next witness, testified, in substance, that she went to the scene of the bombing on the 16th day of August, 1977; that she spoke with some officers whose names she did not know, and told them that she had seen a pipe in the

petitioner's car; that she did not recall whether she had told the police about any statements petitioner had made to her since the bombing occurred several years ago.

Petitioner's next witness, Harold Lock, a Dothan police officer, testified, in substance, that he was involved in the investigation which led to the conviction of the petitioner; that the pipe found at the job site where petitioner worked, and the pipe found at petitioner's home were similar to the pipe found at the bomb scene; that the pipe used in the bomb and the pipe found in petitioner's yard both had threads on one end; that Randy Collins had seen a bomb on the front porch immediately after petitioner left the scene of the bombing; that the pipe in the debris of the bomb was broken and twisted, and that he estimated the size of the pipe used in the bomb to be two to two and a half inches, galvanized, and the same type of pipe found at appellant's job site and home.

Petitioner's next witness, L. E. Stokes, a Dothan police officer, testified, in substance, that he obtained a search warrant for petitioner's car; that Randy Collins told Stokes that he saw something on the steps of the house after the petitioner left the scene, but could not recall Collins' description of it.

Petitioner's exhibit one is a drawing of a two-inch galvanized pipe. Petitioner's exhibit two is a drawing of a carbon steel pipe, and a galvanized pipe with nipples on them.

On September 18, 1981 at the conclusion of the evidence offered by the petitioner on his petition for writ of error coram nobis, the trial court being of the opinion that the evidence did not establish that petitioner was entitled to a writ of error coram nobis, therefore, the petition was dismissed. Appellant gave notice of appeal to this Court on September 22, 1981, and requested permission to proceed in forma pauperis, and pro se.

The petitioner contends in his brief that he is entitled to a new trial because: First, that the search warrants issued to search his vehicle and to search his home were issued under false affidavits. Second, that he has been denied his right to an attorney during the preliminary stage of the proceeding when the district attorney was actively involved in the prosecution of the case on the day of the occurrence. Third, that he is entitled to a new trial under the decision rendered in the *Beck* case. *Beck v. State of Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392.

[1] The appellant's first contention in his brief is that he should be granted a new trial because: (1) The affidavits used to obtain the search warrant for his automobile; and (2) The affidavits used to obtain the search warrant for his home were false. This issue was fully submitted by the appellant to the trial court, and there adjudicated, and upon appeal to this Court from his conviction, was affirmed by this Court. See *Richardson v. State*, Ala.Cr.App., 376 So.2d 208, and again confirmed by the Supreme Court of Alabama. See *Ex Parte Richardson*, Ala., 376 So.2d 228. This Court will not adjudicate again the same issues that have already been adjudicated between the same parties, over and over again on an application for a writ of error coram nobis. *Richardson v. State, supra; Ex Parte Richardson, supra; Summers v. State*, Ala.Cr.App., 366 So.2d 336; *Ex Parte Rudolph*, 276 Ala. 392, 162 So.2d 486; *Cert. Den.*, 377 U.S. 919, 84 S.Ct. 1185, 12 L.Ed.2d 88; *Impson v. State*, Ala.Cr.App., 339 So.2d 1098. We hold that the matters of the validity of the search warrants have been fully adjudicated, and the appellant may not again adjudicate them by this petition for a writ of error coram nobis.

The appellant's second contention is that he has been denied his right to an attorney during the preliminary stages of the proceedings when the district attorney was actively involved in the prosecution of the case on the day of the occurrence.

We have diligently searched the original petition for a writ of error coram nobis filed in this cause on April 10, 1981, and the amended petition filed July 2, 1981, and do not find a fact stated in the petition, or

amended petition, that the appellant was at any time denied the right of counsel, nor do we find any evidence in the transcript of the hearing on the petition from which a conclusion could be drawn that the appellant was denied right to counsel. We only find the statement in the transcript of the hearing, made by appellant's counsel to the court, that appellant contends that: "Under the Lomax case, which is cited in his petition, that he has been denied his fourth amendment rights, and his rights to an attorney, during the preliminary stages of the proceedings when the district attorney was actively involved in the prosecution of the case on the day that the occurrence happened that gave rise to the indictment." The appellant was represented by counsel at his original trial, and on appeal from his original trial, to this Court, and in the Supreme Court of Alabama. Appellant was represented by counsel at the hearing in the trial court in this case and, on request of the appellant, is represented pro se on this appeal.

[2, 3] We hold that in the absence of an averment in the petition for the writ of error coram nobis, that the appellant was denied assistance of an attorney at his original trial, *and* in the absence of any evidence showing a denial of the appellant's right of counsel at his original trial, the trial court did not err to the prejudice of the appellant when it did not grant him a new trial on the ground that he was denied counsel. Petitioner must aver facts, in his petition for a writ of error coram nobis which, if proven, would entitle him to the writ, and on the trial he must prove such facts. *Summers v. State, supra; Corley v. State*, Ala.Cr.App., 397 So.2d 223; *Cert. Den.*, Ala., 397 So.2d 225.

The third contention contained in appellant's brief is that he is entitled to a new trial because of the opinion of the United States Supreme Court rendered in the case of *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392, decided June 20, 1980.

Appellant avers in his petition that the United States Supreme Court ruled in *Beck v. State* that: "The death sentence may not be constitutionally imposed after a jury verdict of guilt of a capital offense when the jury was not permitted to consider a verdict of a lesser included offense of a non-capital nature."

The appellant was convicted under *Code of Alabama, 1975*, Section 13-11-1—Section 13-11-9. Section 13-11-2(a)(9) provides for the death or life imprisonment without parole for the: "willful setting off or exploding dynamite or other explosive under circumstances now punishable by Section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;"

We quote from *Beck*, emphasis supplied.

"We granted certiorari to decide the following question:

'May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, *and when the evidence would have supported such a verdict*?' 444 U.S. 897, 100 S.Ct. 204, 62 L.Ed.2d 132.

"We now hold that the death penalty may not be imposed under these circumstances."

We note that the *Beck* case specifically held that a death sentence may not constitutionally be imposed after a jury verdict of guilty of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, *and when the evidence would have supported such a verdict.* In the case of *Joseph S. Hopper, Commissioner, Alabama Department Of Corrections and James D. White, Warden, Petitioners, v. John Louis Evans, III*, — U.S. —, 102 S.Ct. 2049, 72 L.Ed.2d 367 released by the Supreme Court Of The United States, May 24, 1982, Chief Justice Burger said:

"*Beck held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given only when the evidence war-*

*rants such an instruction.* The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence. Under Alabama law, the rule in non-capital cases is that a lesser included offense instruction should be given if '*there is any reasonable theory from the evidence which would support the position.*' *Fulghum v. State* 291 Ala. 71, 75, 277 So.2d 886, 890 (1973). The federal rule is that a lesser included offense instruction should be given '*if the evidence would permit a jury rationally to find (a defendant) guilty of the lesser offense and acquit him of the greater.*' *Keeble v. United States*, 412 U.S. 205, 208 [93 S.Ct. 1993, 1995, 36 L.Ed.2d 844] (1973). The *Alabama rule clearly does not offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases.*'"

Chief Justice Burger further stated in *Hopper v. Evans, supra:* "The evidence not only supported the claim that respondent intended to kill the victim, but affirmatively negated any claim that he did not intend to kill the victim. An instruction of the offense of unintentional killing during this robbery was therefore not warranted."

[4] The appellant's petition for a writ of error coram nobis in this case does not aver that the petitioner was entitled to an instruction of a lesser included offense. There is no evidence before this Court that the petitioner was entitled to have the jury instructed on a lesser included offense. There is no evidence before this Court that the evidence presented to the jury at the original trial of the petitioner would have supported a conviction of a lesser included offense. The evidence fully supports the jury verdict that the petitioner intended to kill the victim. We hold that the preclusion clause did not prejudice the petitioner in any way, and that the trial judge did not err when he denied petitioner's petition for a writ of error coram nobis. *Hopper v. Evans, supra; Beck v. Alabama, supra; Richardson v. State*, Ala.Cr.App. 376 So.2d 205; *Ex Parte Richardson*, Ala. 376 So.2d 228; *Beck v. Alabama*, 444 U.S. 897, 100 S.Ct. 204, 62 L.Ed.2d 132; *Summers v. State, supra.*

The judgment of the trial court is due to be and is hereby affirmed.

The foregoing opinion was prepared by Honorable JOSEPH J. MULLINS, a retired Circuit Judge, serving as a Judge of this Court; his opinion is hereby adopted as that of the Court.

The judgment below is hereby affirmed.

AFFIRMED.

All the Judges concur.

Willie Lee CARTHON, Alias Willie Lee Pryor

v.

STATE.

4 Div. 978.

Court of Criminal Appeals of Alabama.

June 29, 1982.

Rehearing Denied July 27, 1982.

Defendant was convicted before the Circuit Court, Covington County, William H. Baldwin, J., of assault in the first degree, and he appealed. The Court of Criminal Appeals, Joseph J. Mullins, Retired Circuit Judge held that: (1) denial of petition for youthful offender treatment was not abuse of discretion; (2) indictment was sufficient to sustain jury verdict finding defendant guilty of assault in the first degree; (3) voluntary statement made by defendant, a minor, was admissible even though counsel was not present; and (4) defendant was not entitled to new trial on ground that his insanity should be inquired into.

Affirmed.

APPENDIX B

MAILING ADDRESS:
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TELEPHONE: 832-6480

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

October 1, 1982

Re: 81-937
Ex Parte: Herbert Lee Richardson
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Herbert Lee Richardson vs. State of Alabama)

Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

XXXXX Petition for Writ of Certiorari denied. No opinion. JONES, J. - TORBERT, C.J., MADDOX, FAULKNER, ALMON, SHORES, EMBRY, BEATTY AND ADAMS, JJ., CONCUR.

_____ Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

_____

10-1-82
wo

Dorothy F. Norwood

Acting Clerk, Supreme Court of Alabama